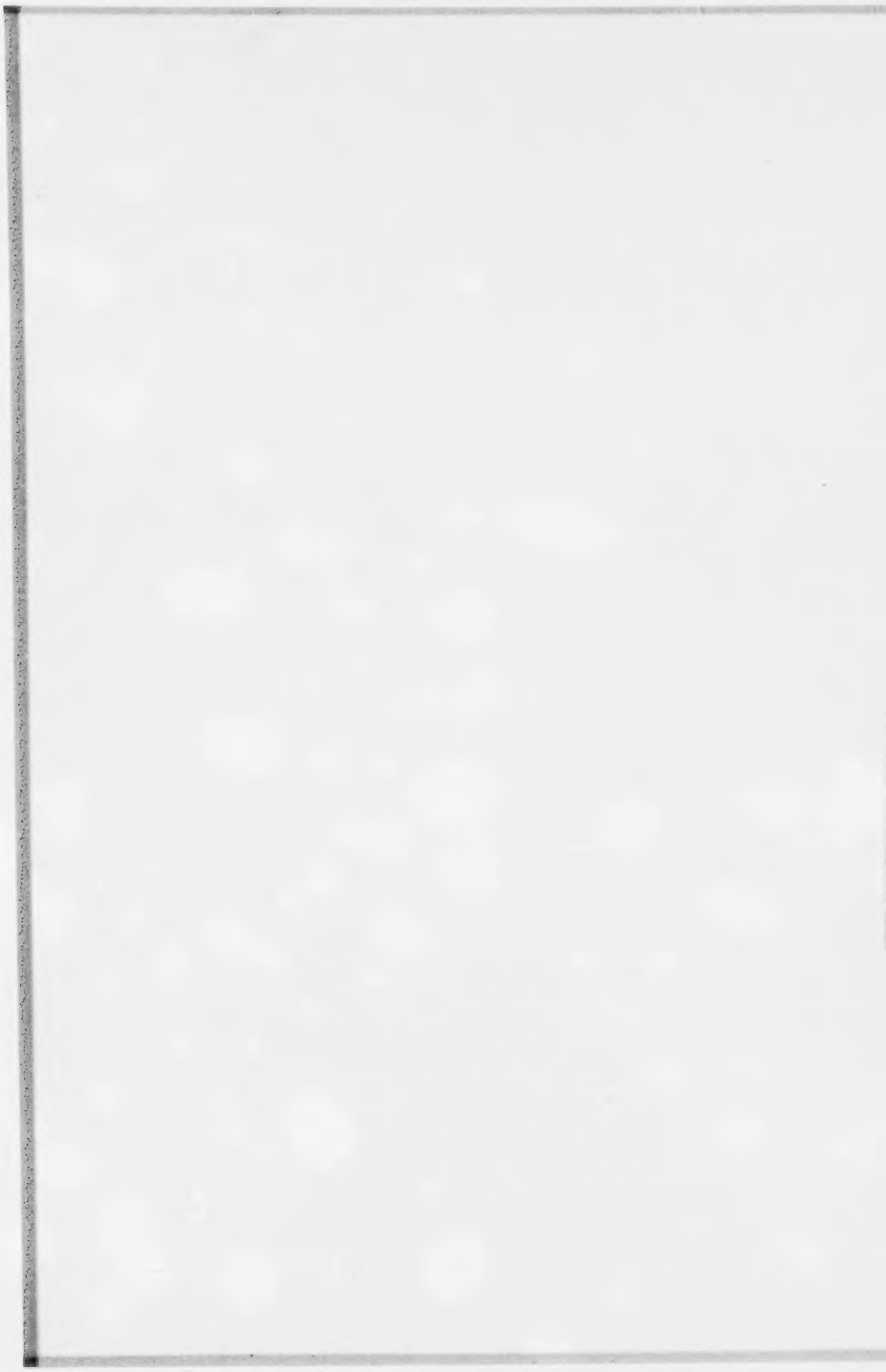

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. .....

BYRON J. WALTERS,

Petitioner,

vs.

EDITH MAUD WILSON,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported in 142 Fed. (2d) 59, and is in the record at page 133.

The minute order on review of the District Judge is in the record [R. 105], as is the opinion of the Referee [R. 61], the findings of fact and conclusions of law of the Referee [R. 79], and the order of the Referee [R. 111].

II.

Statement of the Case and the Facts.

The essential facts of the case are set forth in the accompanying petition for a writ of certiorari.

III.

Specifications of Error Relied On.

1. The Circuit Court of Appeals for the Ninth Circuit committed error in filing its judgment or decree herein on April 8, 1944, modifying and affirming the judgment or decree of the Court below. The ruling of the Circuit Court is error and against the law applicable to the facts of the case in the following respects:

(a) The Court erred in ruling that the petition therein is an effort to relitigate in the Bankruptcy Court an issue which he had previously litigated in the courts of California.

(b) The Circuit Court erred in determining that petitioner could not present the issues contained in his petition herein in the Bankruptcy Court after certain phases thereof had been litigated in the State courts.

(c) The Court erred in affirming the judgment of the District Court in its declination to assume jurisdiction.

(d) The Circuit Court erred in reinstating the findings and order of the Referee in Bankruptcy which had been reversed by the District Judge.

(1) If the District Court does not assume jurisdiction it cannot make findings upon the merits.

(2) If it does assume jurisdiction and makes findings then the Circuit Court of Appeals should pass upon all of the merits of the case as reflected in the findings and should determine:

a. Are the findings of fact supported by the evidence?

b. Do the conclusions of law correctly state the law of the case as applied to the facts.

(e) The Circuit Court should have passed upon the merits of this case and ruled as a matter of law that the judgment against bankrupt in the Superior Court of California was a judgment *ex contractu* and not a judgment on a liability for obtaining money or property by false pretenses or false representations within the meaning of Section 17(a) 2 (11 U. S. C. A. Sec. 35); and that it was therefore discharged by petitioner's final discharge in bankruptcy; and should thereupon have made and entered its judgment and decree reversing the order of the District Court and directing said District Court to issue the permanent injunction prayed by petitioner.

IV.

Summary of Argument.

1. The Circuit Court of Appeals erred in failing to rule that the District Court has jurisdiction to consider bankrupt's supplemental, ancillary and dependent petition in equity.

A. Such jurisdiction is inherent and plenary and is not wholly dependent upon the existence of "unusual circumstances."

B. If unusual circumstances must exist—they exist in this case.

C. The decision of the California Supreme Court in *Wilson v. Walters* (19 Cal. (2d) 111) has no binding effect on the Bankruptcy Court in its con-

sideration of the petition for injunction filed therein, because

(1) The courts of the United States are not bound by the decisions of a State court on the question whether or not judgments against bankrupt are debts excepted from the operation of the final discharge of bankrupt, within the meaning of Section 17a (2) Bankruptcy Act (11 U. S. C. A. 1135), jurisdiction to determine such question being *essentially federal and exclusive in character.*

(2) And the Bankruptcy Court herein is not bound by the doctrine of *res adjudicata* arising from decisions of the State court in litigation between creditor and bankrupt.

(a) The State Supreme Court's decision is *not res adjudicata* in the federal proceedings as to the effect of the discharge in bankruptcy because a State court has no jurisdiction to decide the issues as presented by petitioner's ancillary bill in equity herein.

(b) The State Supreme Court's decision is *not res adjudicata* because it is *not a final judgment.*

(c) The State Supreme Court's decision is *not res adjudicata* as to the effect of the discharge in bankruptcy because the decision on such point was *dictum.*

2. The Circuit Court erred in failing to reverse the District Court for failure to make any findings of fact upon which to base its order, which were mandatory under Rule 52(a), Federal Rules of Civil Procedure.

3. The debt represented by the judgment of creditor against bankrupt is not a liability for obtaining property by false pretenses or false representations, within the meaning of Section 17(a)2 of the Bankruptcy Act (11 U. S. C. A., Sec. 35), *but is a liability ex contractu.*

A. The judgment of creditor against bankrupt [R. 46] in apportioning damages between the two co-defendants is indisputably a judgment on contract.

B. A further analysis of the complaint [R. 28-43] on which the State court judgment is based clearly shows that the action is contractual in nature; and by the overwhelming weight of authority the complaint and resulting judgment sound in contract.

C. The complaint in the State court action sounding in contract, creditor, by bringing her action in such form, *waived the alleged fraud* and sued in contract.

(1) This is true under existing California law which the Supreme Court of California failed to follow (*Wilson v. Walters*, 19 Cal. (2d) 111).

(2) And the *doctrine* of the *waiver of fraud* has been *accepted and followed in bankruptcy cases* (beginning with *Crawford v. Burke*, 195 U. S. 176, which case was expressly repudiated by the California Supreme Court (*Wilson v. Walters*, 19 Cal. (2d) 111) and by overruling *Marr v. Superior Court*, 30 Cal. App. (2d) 275, 86 Pac. 141).

D. The *burden of proof in this case is upon the creditor* to establish that the judgment is *excepted* from the operation of bankrupt's discharge and *this burden has not been sustained.*

ARGUMENT.

I.

The Circuit Court of Appeals erred in failing to rule that the District Court Has Jurisdiction to Consider Bankrupt's Supplemental, Ancillary and Dependent Petition in Equity.

A. Such Jurisdiction Is Inherent and Plenary and Is Not Wholly Dependent Upon the Existence of "Unusual Circumstances."

The Circuit Court of Appeals said (142 Fed. (2d) 59—this record page 135):

> "Thus appellant sought to relitigate in the Bankruptcy Court an issue which he had previously litigated in the Courts of California and which had there been determined against him. This he could not do."

The Court cites as authority for this statement the case of:

Hobbs v. Franklin Jewelry Co.,

which we have heretofore shown in our petition for certiorari not to be the law. We have also shown that the other cases cited in footnote 5 of the opinion are not applicable.

Arrayed against this view of the Circuit Court is the *overwhelming weight of authority* found in the decision of this Honorable Court in the case of:

Local Loan Co. v. Hunt, 292 U. S. 234,

and in other decisions to which we will hereafter refer.

In the case of *Local Loan Co. v. Hunt, supra, this Court* says at page 239:

> *"First.* The pleading by which respondent invoked the jurisdiction of the Bankruptcy Court in the present case is in substance and effect a *supplemental and ancillary bill in equity,* in aid of and *to effectuate the adjudication and order made by the same court.* That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is *well settled.* Root v. Woolworth, 150 U. S. 401, 410-412; Julian v. Central Trust Co., 193 U. S. 93, 112-114; Riverdale Mills v. Manufacturing Co., 198 U. S. 188, 194 *et seq.; Freeman v. Howe,* 24 How. 450, 460. And this, irrespective of whether the court would have jurisdiction if the proceeding were an original one. The proceeding *being ancillary and dependent,* the jurisdiction of the court follows that of the original cause, and may be maintained without regard to the citizenship of the parties or the amount involved, and notwithstanding the provisions of S. 265 of the Judicial Code (R. S., S. 720), U. S. C., Title 28, S. 379. Julian v. Central Trust Co., *supra,* 112; Dietzch v. Huidekoper, 103 U. S. 494, 497; Root v. Woolworth, *supra,* 413; M'Donald v. Seligman, 81 Fed. 753; St. Louis, I. M. & S. Ry. Co. v. Bellamy, 211 Fed. 172, 175-177; Brun v. Mann, 151 Fed 145, 150.
>
> *"These principles apply to proceedings in bankruptcy. In re* Swofford Bros. Dry Goods Co., 180 Fed. 549, 554; Sims v. Jamison, 67 F. (2d) 409, 410; Pell v. M'Cabe, 256 Fed. 512, 515-516; Seaboard Small Loan Corp. v. Ottinger, 50 F. (2d) 856, 859.

> "Petitioner relies upon a number of decisions where other Federal Courts sitting in bankruptcy have declined to entertain suits similar in character to the present one, on the ground that effect of a discharge in bankruptcy is a matter to be determined by any Court in which the discharge may be pleaded. See, for example, Hellman v. Goldenstone, 161 Fed. 913; *In re* Marshall Paper Co., 102 Fed. 872, 874; *In re* Weisberg, 253 Fed. 833, 835 *In re* Havens, 272 Fed. 975. To the extent that these cases *conflict with the view just expressed* they are *clearly not in harmony* with the *general rule in equity* announced by this Court." (Emphasis ours.)

Every statement in the above quotation applies to the case at bar. The proceeding initiated by the bankrupt in this case is identical to the one initiated by the bankrupt in the quoted case—and the relief sought is the same.

Thereafter, in the same case on page 241 of 292 U. S., the Supreme Court says:

> *"What has now been said establishes the authority of the bankruptcy court to entertain the present proceeding, determine the effect of the adjudication and order and enjoin petitioner from its threatened interference therewith."*

The above statement is *clear and unequivocal.* There can be no doubt as to its purpose and meaning. It establishes with finality the jurisdiction of the Court. This jurisdiction either exists or it does not exist. Jurisdiction, as such, cannot depend upon "unusual circumstances," for jurisdiction is power to act.

There is a statement immediately following the one last quoted from *Local Loan Co. v. Hunt, supra,* which has

been seized upon by the District Court to justify its refusal to assume jurisdiction in this case. It follows:

> "It does not follow, however, that the court was bound to exercise its authority. And it probably would not and should not have done so except under unusual circumstances such as here exist."

On the basis of the above quotation, the District Court ruled that the Referee was right in declining to take jurisdiction, and that the Court itself should not assume jurisdiction because it felt that no "unusual circumstances" exist in this case, such as the Supreme Court "envisaged." And it did all this *without even making any findings as to the existence of a single circumstance as a fact, usual or unusual,* which did or did not appear in the proofs of the case.

And if it be construed that the Referee's findings of fact are by the decision of the Circuit Court now reinstated we maintain that such findings are not now controlling because petitioner herein has been *denied a review* of them. And even if they are now controlling there is nothing in the findings to warrant either the Referee or the District Court in holding that jurisdiction should not be taken by the District Court.

By the use of the words "it does not follow, however, that the Court was bound to exercise its authority," this Honorable Supreme Court could not possibly mean to retract and vitiate its unequivocal declaration of jurisdiction immediately preceding. To so hold would do violence to the plain intent and meaning of the words and to every rule of construction. It did nothing more than to express the ancient rule that a court of equity is not bound to grant the relief within its powers unless the

circumstances warrant, or sufficient equity is shown. In adding the thought that the Court "would not and should not have done so, except under unusual circumstances, such as here exist" this Court, we respectfully assume, was simply stating that in its opinion, sufficient equities existed for the granting of its equitable relief. This Court did not say, nor could it have meant, that relief would be granted only in cases where the facts were identical to those under consideration; this would be absurd, as it is well known that courts of equity act in a multiplicity of circumstances. And by the use of the word "bound to exercise its authority" the plain context makes it apparent that this Court meant "bound to grant the injunction." It is elementary that a Court can either grant or deny relief; but it is equally certain that its jurisdiction to hear and determine the matter is not thereby effected—for it must assume jurisdiction before it can determine whether to grant or withhold relief—that is, it must determine by findings of fact the circumstances upon which it is petitioned to act.

The above argument is borne out by an examination of the portion of the opinion of *Local Loan Co. v. Hunt, supra,* immediately following the last quoted portions, 292 U. S. 241. This Court on this entire page is doing nothing more nor less than setting forth the equities which exist in favor of the bankrupt—the inadequacy of appeal to the law side as against the equity side; the settled but unfavorable views of the State court; the alternative of long and expensive State court litigation "before reaching a Court whose judgment upon the merits of the question had not been predetermined." What are these, if they are not statements of the equities giving rise to the reason for the granting of the injunctive relief

prayed? We have no quarrel with the District Court if it chooses to call them "unusual circumstances" but we do say that they are not the bases for the assumption of jurisdiction, for *that* the Court already possessed; but they were only the bases by which the Court was guided in deciding to grant its injunctive relief. And if it was necessary for these equities or circumstances to be "envisaged," the trier of the facts must assume jurisdiction before they, or any other equities or circumstances, can be brought to pass before his judicial vision.

This Court further says at page 244 of 292 U. S.:

> *"It is important to bear in mind that the present case is one not within the jurisdiction of a state court, but is a dependent suit brought to vindicate decrees of a federal court of bankruptcy entered in the exercise of a jurisdiction essentially federal and exclusive in character. And it is that situation to which we address ourselves, and to which our decision is confined."* (Emphasis ours.)

The instant case is likewise a dependent suit, brought to vindicate a decree of the federal court; the same kind of a decree which was sought to be vindicated in the cited case, to-wit: a final discharge in bankruptcy; and for any federal court to deny its own jurisdiction, in this respect, is to strip such Court of duties and powers which this Court has said not only that it enjoys, but which are *essentially and exclusively federal.*

We have heretofore suggested that in the circumstances and in view of the context the quoted passage concerning "unusual circumstances" is *dictum* because it deals in probabilities, seems not to be necessary to the decision and is not decisive of any issue raised.

And the conclusion is inescapable that doubt is cast upon the true significance of this statement concerning unusual circumstances in *Local Loan Co. v. Hunt, supra,* because this Court in the *Local Loan* case, in holding that the facts showed a proper case for the exercise of equitable jurisdiction referred to *Seaboard Small Loan Corporation v. Ottinger,* 50 Fed. (2d) 859 with approval. Upon referring to the *Ottinger* decision we find that it rejects the theory that the existence of a remedy in the State Court prevents a Court of Bankruptcy from assuming jurisdiction to enjoin harassment of the bankrupt after his discharge, for the Court was apparently of the opinion that in *every case* where a bankrupt was a wage earner he had a right to resort to the Federal Court to secure the fruits of his discharge; (and we do not suppose that this principle is changed because the wages are earned through mental rather than through physical exertions).

The Court in that case says:

> "In view of this *purpose of the act* and of the expressed provision that the bankrupt shall be *released from all provable debts,* it would be indeed a strange situation if the Court vested with jurisdiction to enforce the act were without power to stay the hand of a creditor whose debt has been discharged by bankruptcy, but who nevertheless *persists in harassing* the bankrupt with efforts to collect it."

And the *Ninth Circuit Court of Appeals* in the case of *Holmes v. Rowe* (1938; C. C. A. 9th), 97 Fed. (2d) 537, while discussing and even quoting extensively from the *Local Loan Co.* case on closely related questions, did not discuss the necessity that *"unusual circumstances"* be present to justify the issuance by a Court of Bankruptcy

of an injunction against the pursuit of State Court proceedings.

In that case the District Court granted bankrupt's petition for a permanent injunction restraining the creditor from levying execution on a judgment against the bankrupt and the appeal was from such order. The creditor had caused a judgment to be entered against the bankrupt who *petitioned the State Court* to restrain the creditor from levying execution but *his petition was denied;* he applied a *second time* to the State Court for relief by way of an order that the judgment be cancelled and discharged of record which *was also denied. Having twice suffered defeat* in the State Court the bankrupt then filed in the United States District Court which had granted his discharge in bankruptcy a petition essentially the same as that filed by the petitioner herein in the District Court below. Upon the appeal from the order of the District Court the main contention of the creditor was that the Court did not have jurisdiction because the bankrupt *had not exhausted* his remedies in the State Court so as to enable him to come into the Federal Court. The Court said:

> "With this contention of appellant we do not agree. A review of the decisions discloses that a Federal District Court, once having obtained jurisdiction of a controversy, and having rendered a decision in the matter, has complete power to *protect the judgment or decree which it has rendered,* and may go so far as to enjoin an action entertained in the state court by a litigant, involving the same subject-matter, when such action may in any way interfere with, or nullify the effect of said judicial determination. So here the Court having discharged the appellee in bankruptcy, still retained sufficient jurisdiction to grant

an injunction restraining appellant from levying execution upon a judgment rendered in his favor by the state court against the appellee upon a claim adjudicated in the bankruptcy court."

Further the Court said:

"Referring to these statutes, the Supreme Court has repeatedly said that, "'the power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is * * * *inherent in a court of bankruptcy,* as it is in a *duly established court of equity.'*" Steelman v. All Continent Corp., 301 U. S. 287, 289, 57 S. Ct. 705, 710, 81 L. Ed. 1085. See, also, Continental Illinois Nat. Bank & Trust Co. v. Chicago, Rock Island & P. Ry Co., 294 U. S. 648, 675, 55 S. Ct. 595, 605, 79 L. Ed. 1110.

"That the District Court not only had the power to issue the writ, but committed no error in issuing it in this particular case, is amply borne out by the case of *Local Loan Co. v. Hunt.*"

Further the Court said:

"Nor do we consider that the failure of the appellee to exhaust his remedies in the state court would preclude the District Court from exercising its jurisdiction in the matter. This was also determined in the case of *Local Loan Co. v. Hunt, supra,* which cited, among others, the case of *Seaboard Small Loan Corporation v. Ottinger,* 4 Cir., 50 F. 2d 856, 77 A. L. R. 956." (Emphasis ours.)

Upon a comparison of the above cited case and the instant decision of the Circuit Court for the same Ninth Circuit it will readily be seen that your petitioner has been placed in a *paradoxical and ridiculous position.* In the *Holmes v. Rowe* case the Court held that the failure of the Bankrupt to exhaust his remedies in the State

Court did not preclude him from seeking the protection of the United States Court. *Implicit in this holding* is the *proposition that the exhaustion of his remedy in the State Court would certainly not have affected the case.* In the instant case the Circuit Court tells this petitioner that because he has exhausted his remedies in the State Courts or as it is put "previously litigated in the Courts of California" when he came to the Federal Court he was not entitled to its protection, saying:

> *"Thus appellant sought to relitigate in the Bankruptcy Court an issue which he had previously litigated in the Courts of California, and which had there been determined against him. This he could not do."*

The Circuit Court in the *instant case* apparently overlooked, forgot or ignored the fact that in the *Holmes v. Rowe* case decided by it only six years ago, the bankrupt who was afforded relief and protected therein by said Court, also

> *"sought to relitigate in the Bankruptcy Court an issue which he has previously litigated in the Courts of California, and which had there been determined against him,"*

and that this same Circuit Court in its affirmance in *Holmes v. Rowe* in effect said: *"This he could do."*

It is no answer to say that in the *Holmes v. Rowe* case the bankrupt quit "trying his luck" in the State Courts *after two defeats* and did not pursue an appeal in the State Courts, as did the bankrupt here. The decision and judgment of the trial court, not appealed, was as final and as binding as the judgment of the Supreme Court in the instant case below (without

conceding that the California decision is final). The issue had been determined against Rowe with the same degree of finality in the State Court as the issue had been determined against the bankrupt in the instant case in the State Court. Rowe sought to and did litigate, in the Federal Courts with their approval, and effectively, the same issue which he had previously litigated in the State Courts and *which had there been determined against him. We ask no more than the same privilege granted by the Court below to Rowe and denied to this petitioner.*

In the *Holmes v. Rowe* case the petitioner made *two motions* in the State Court *calculated to stop execution* on the judgment against him there, which *motions were denied.* In the case at bar this is all that petitioner did. He made a *simple motion* in the Superior Court *that execution under the applicable statute be suspended. Every other proceeding in the State Court thereafter was on the motion and initiative of creditor.*

The motion was granted on one ground, affirmed by the California District Court of Appeals, reversed by the California Supreme Court on two grounds and remanded to the Superior Court for further proceedings where it is now pending. The creditor took all of the appeals.

We invite attention to the case of *In re Skorcz,* 67 Fed. (2d) 187. This case, decided by the Circuit Court of Appeals of the Seventh Circuit, was the decision which the same court followed in deciding *Local Loan Co. v. Hunt* in memorandum fashion (67 Fed. (2d) 998) which found approval by this Court. The Court said, at page 190:

> "It may be conceded, as contended by appellant, that the wages included in the restraining order con-

stituted no part of the bankrupt's estate at the time of the adjudication. That estate, and none other the court was bound to administer; but it does not follow from this admission that the bankruptcy court is not interested in the protection of the bankrupt's subsequent estate. Indeed, quite the converse is true, and constitutes the primary purpose of the bankruptcy enactment. *That the bankruptcy court has plenary power to award that protection by injunction we think there can be no doubt, otherwise the effect of the Bankruptcy Act oftentimes might be destroyed.* 11 U. S. C. A., S. 11, subd. 15; Seaboard Small Loan Corp. v. Ottinger, *supra; In re Fellows* (D. C.), 43 F. (2d) 122; *In re* Voorhees, *supra; In re* Swofford Bros. (D. C.), 180 F. 549; *In re* Home Discount Co., *supra.*" (Emphasis ours.)

Another case, very similar to the case at bar, both from a factual standpoint and on principle, is:

> *Davison-Paxon Co. v. Caldwell*, 115 Fed. (2d) 189, decided by the Circuit Court of Appeals for the 5th Circuit in 1940.

We state the issues before the Circuit Court briefly:

This appeal was by a creditor from a judgment of the District Court of the United States for the Northern District of Georgia in favor of the bankrupt in an ancillary proceeding to enjoin the enforcement against the bankrupt by garnishment of a judgment entered against him in a Georgia state court. As in the present case the suit was brought in the bankruptcy court on the ground that the debt had been discharged in bankruptcy and "because of the settled but erroneous state of the decisions in Georgia, plaintiff had been compelled to invoke the jurisdiction of the bankruptcy court." The defendant contested the suit

on the ground: (1) that the matter was one for decision in the state courts and not for the invocation of the bankruptcy jurisdiction; (2) *that the judgment it had obtained was a conclusive adjudication that the debt was not discharged in bankruptcy. The district judge maintained his jurisdiction on the basis of Local Loan Co. v. Hunt, and determined the effect of the state court judgment on the pleadings in that court and held that the debt was dischargeable and had been discharged and granted the relief prayed.* The appeal followed. The facts of the case are:

In 1939 appellant sued appellee in the Municipal Court for $444.00 for merchandise purchased. A few days thereafter appellee filed her voluntary petition in bankruptcy scheduling defendant as one of her creditors and was duly adjudged bankrupt. A short time thereafter appellant filed an amended complaint alleging in effect that at the time of the purchase the defendant was insolvent and had no present intention to pay for the goods and concealed her insolvency and lack of intention to pay; that appellant relied on the defendant's promise to pay and was damaged; that the action of defendant in purchasing the merchandise without a present intention to pay and knowing her promise to pay for the same *was false, deceitful and fraudulent.*

Thereafter in the state court, *the appellee defendant filed a plea for a stay of proceedings,* setting out that the debt upon which the suit was predicated was dischargeable in bankruptcy. *The state court rendered judgment nevertheless in favor of the plaintiff.* Thereafter the appellee filed in the bankruptcy court an application for injunction reciting the above facts and that the plaintiff had sued out

a garnishment to collect on the judgment debt which appellee claimed had been discharged in bankruptcy. The Circuit Court said:

> "It was not denied below, it is not denied here, *that the decisions of Georgia are to the effect that a debt contracted as, according to the amended petition, this debt was, is, within the exception of Sec. 17, sub. a (2), of the Bankruptcy Act, 'a liability for obtaining money or property by false representations.'* What was in question below, what is in question here, is whether a debt created as this one was, according to the allegations of the amended petition, is such a liability.
>
> "The District Judge thought it was not. We agree. *But for the Georgia decisions holding that the purchase of goods with no present intention to pay results in a debt which is a liability for obtaining money or property by false pretenses and false representations, we should regard the question as admitting of only one answer. . . .*"

The Circuit Court then proceeds to affirm the decision of the District Court granting the relief prayed by the bankrupt.

In the case of *Gleason v. Thaw,* 185 Fed. 345, the Circuit Court of the United States directly held that under the amendment of 1903 there is a direct duty imposed upon the court of bankruptcy to determine the nature of the debt, and whether or not it comes within the exception to the operation of the discharge in bankruptcy. We quote from the opinion:

> "By the act of 1898, as it originally stood, judgments in actions for frauds were made such exceptions, and as such would be binding upon a court of bankruptcy. The amendment of 1903 changed this

language to 'liabilities for obtaining property under false pretenses or false representations,' so that debts which are such liabilities are now excluded from the provable debts of which the bankrupt may be discharged. *While enlarging somewhat the scope of such exceptions, this amendment imposed upon the court of bankruptcy the duty of determining whether the debt sought to be excepted was or was not such a liability.*" (Emphasis ours.)

In the light of the foregoing cases, the District Court should have assumed and exercised full jurisdiction to determine the nature of the state court's judgment, in order to protect, or at the very least, to determine and declare the rights of the bankrupt in his discharge; in so doing that court exercises a jurisdiction essentially federal and exclusive in character, and that court should have, in the further exercise of its broad equitable powers, granted the injunctive relief as prayed.

B. If Unusual Circumstances Must Exist, They Exist in This Case.

Bankrupt's petition to the District Court [R. 3] contained the following allegations upon which the Referee *failed to make any findings of fact:*

In paragraph II thereof [R. 4]:

". . . that although duly notified of the proceedings in bankruptcy and having timely knowledge thereof, said Edith Maud Wilson failed to file a claim in said bankruptcy proceedings."

In paragraph III [R. 5]:

"That the said Edith Maud Wilson despite such notice and knowledge did nothing with respect to the said liability nor did she at the subsequent hearing on your petitioner's discharge object to the same as

she had ample right and power to do under Section 14 of the Bankruptcy Act."

And in paragraph VI [R. 7]:

"Your petitioner alleges that the said Edith Maud Wilson threatens to, and unless restrained therefrom will proceed with the enforcement of the said judgment of the Superior Court against your petitioner and that if she is allowed to proceed with the enforcement of said judgment, such procedure would nullify the decree of this Honorable Court granting to your petitioner a final discharge from all of his debts and would circumvent the objects and purposes of the Bankruptcy Act."

And in paragraph VII [R. 7-8]:

"That your petitioner is a Judge of the Municipal Court of the City of Los Angeles having assumed that office on August 2, 1937, by appointment of the Governor of the State of California. That all of the salary of petitioner is necessary for the support of his dependents and himself, he being married and having five dependents besides his wife, three of whom are minor children of school age, his oldest daughter being in her sophomore year in college, and his son being in the last elementary grade in a military academy. That continuous and unrelenting pursuit for the satisfaction of said judgment by said Edith Maud Wilson has caused and will continue to cause much damage to your petitioner because of the character of his position and the nature of his public duties. That the work of your petitioner is such that the harassment and annoyance of private litigation is disturbing to his work and the usual attendant publicity accompanying the exercise of the asserted rights of said Edith Maud Wilson to enforce execution of the judgment continues to damage

> your petitioner irreparably, particularly in view of the fact that your petitioner is by law an elective officer and subject to the will of the people at stated elections within the City of Los Angeles, and further in view of the fact that said Edith Maud Wilson continues to assert that said judgment is based in fraud and is not dischargeable in bankruptcy."

And although the District Judge reversed all findings and made none of his own and found that [R. 105]: "none of the unusual circumstances warranting assumption of jurisdiction which the Supreme Court envisaged in *Local Loan Co. v. Hunt,* 1934, 292 U. S. 234, 241, exists. (and see: Hobbs v. Franklin Jewelry Co. Inc., 1942, 5 Cir., 131 F. (2d) 432)", although having no factual basis upon which to base this conclusion of law.

And while the Circuit Court of Appeals evidently reinstated the findings of fact of the Referee, it is none the less true that the Referee's findings of fact were *silent* as to *findings on the circumstances alleged in the petition* as just hereinabove quoted.

Yet the only alternative we now have is to argue the point of unusual circumstances even though we think that findings of fact thereon should be made before any Court should dismiss bankrupt's petition as all of the lower Courts did (and even though we do not concede that unusual circumstances must exist to warrant jurisdiction).

Are the circumstances of this case so different from those in Local Loan Co., supra, that the lower Courts could properly hold that as a matter of law they do not warrant the assumption of jurisdiction?

We most emphatically urge that they are not.

In the *Local Loan* case (p. 241), it was open to the respondent to submit to the Municipal Court the question

as to the effect of the bankruptcy decrees, and that court was authorized in law to afford relief, the equivalent of that sought by the respondent in the federal court. The same holds true in the instant case, as the Superior Court could have granted equivalent relief. In the cited case, the legal remedy would be inadequate to meet the requirements of justice, because the highest court of Illinois had already resolved against bankrupt the sole question at issue. The same is true in the instant case [R. 65]. In the cited case, the alternative of invoking the equitable jurisdiction of the Bankruptcy Court was long and expensive litigation in the state courts, before reaching a court "whose judgment upon the merits of the question had not been predetermined." Such court could only be the federal court, as we have just seen that the matter had been determined by the highest court of Illinois. In the instant case the only alternative to invoking the jurisdiction of the federal court will be a continuous series of garnishments against bankrupt's salary—involving a multiplicity of hearings to determine exemptions, actions to renew the judgment and successive appeals based upon the rulings on such matters in the state courts. In the cited case, the remedy was inadequate because (p. 242) of the wholly disproportionate trouble, embarrassment, expense, and possible loss of employment which it involved.

In the instant case the bankrupt's petition to the Bankruptcy Court alleges: continuous and unrelenting pursuit for the satisfaction of said judgment by creditor [R. 7], *causing much damage to petitioner because he is a Judge of the Municipal Court of the City of Los Angeles, and particularly because he is an elective officer and subject to the will of the people at stated elections and because*

creditor continues to assert that said judgment is based in fraud [R. 8]; *that the work of petitioner is such that the harassment and annoyance of private litigation is disturbing to his work; and the usual attendant publicity accompanying the asserted rights of creditor to enforce execution of the judgment continues to damage petitioner irreparably* [R. 8]; *successive proceedings in the State courts, and trouble and embarrassment caused petitioner in the support of six dependents* [R. 7].

Furthermore the decision of the State Supreme Court in *Wilson v. Walters,* 19 Cal. (2d) 111—although purporting to determine certain issues, actually is not yet final because the court remanded the cause to the trial court for further proceedings.

We earnestly submit that the most important circumstance leading to the affirmance of injunctive relief in the *Local Loan* case, was the *settled but erroneous state* of the decisions of the Illinois Supreme Court, which were destructive of the purpose and spirit of the Bankruptcy Act (p. 245). In the instant case, the bankrupt has urged and still urges, the erroneous state of the decisions of the Supreme Court of California on a matter involving the interpretation of a federal statute, to-wit: the Bankruptcy Act—and particularly involving the types of judgments excepted from discharge under section 17(a)2 of said Act, but the District Judge after unmistakably indicating his agreement, in principle, with bankrupt's contentions as to the nature of the state court judgment [R. 101-102] thereafter, and without having himself refuted the law or logic advanced by him, and without being advised to the contrary by any cited decision, withdrew (as did the Referee) into a self-imposed "shell" of lack of jurisdiction, totally ignoring the fact that the very state

of the decisions of the California Supreme Court afforded the "unusual circumstance" which it thought so necessary to an assumption of jurisdiction. We challenge anyone to analyze the decision of *Local Loan Co. v. Hunt, supra,* and to reach any conclusion except that the vital circmstance justifying equitable relief was the *settled adverse and erroneous state of decision of the Illinois courts; and yet in the instant case the District Judge has refused even to determine such issue, either for or against bankrupt, contenting himself with the observation that* [R. 104-105] "* * * the decision of the Supreme Court of California on the subject (*Wilson v. Walters,* 1941, 19 Cal. (2d) 111), should be accepted as binding on the bankruptcy court," and terminates his refusal to assume jurisdiction by the proviso, "after final determination of the state court," without expressing agreement with such decision as a matter of law. The Circuit Court of Appeals, in effect, fell into the same error [R. 135].

But wherein are the circumstances warranting the intervention of the powers of the Federal Court in the case at bar essentially different from the circumstances in the cases of:

Holmes v. Rowe, supra (9 Cir.);

Davison, Paxon Co. v. Caldwell, supra;

In re Skorcz, supra;

Sims v. Jamison, supra (9 Cir.) (Cited in *Local Loan Co. v. Hunt*);

Seaboard Small Loan v. Ottinger, supra (Cited in *Local Loan Co. v. Hunt*);

In re Swofford Bros. Dry Goods Co., 180 Fed. 549 (cited in *Local Loan Co. v. Hunt*);

Pell v. McCabe, 256 Fed. 512 (cited in *Local Loan Co. v. Hunt*).

C. The Decision of the California Supreme Court in Wilson v. Walters Has No Binding Effect on the Bankruptcy Court in its Consideration of the Petition for Injunction Filed Therein, Because

(1) THE COURTS OF THE UNITED STATES ARE NOT BOUND BY THE DECISIONS OF A STATE COURT ON THE QUESTION WHETHER OR NOT JUDGMENTS AGAINST A BANKRUPT ARE DEBTS EXCEPTED FROM THE OPERATION OF THE FINAL DISCHARGE OF BANKRUPT, WITHIN THE MEANING OF SECTION 17a(2) BANKRUPTCY ACT (11 U. S. C. A. 1135), JURISDICTION TO DETERMINE SUCH QUESTION BEING ESSENTIALLY FEDERAL AND EXCLUSIVE IN CHARACTER.

We think it is indisputable in the record that the existence of the State Court decision (*Wilson v. Walters,* 19 Cal. (2d) 111), was the *primary and impelling reason* for the refusal to assume jurisdiction in this case by the Referee, the District Judge and the Circuit Court of Appeals. As a matter of fact this is the only proposition upon which they have all agreed.

But this Honorable Court, in upholding the Federal jurisdiction in *Local Loan Co. v. Hunt, supra,* was not disturbed by the existence of final state court opinions in disagreement with its own views—much more—it was at pains to declare the inefficacy and lack of binding effect and even the lack of jurisdiction of the state court (292 U. S. 234, 240):

> *"Petitioner relies upon a number of decisions where other federal courts sitting in bankruptcy have declined to entertain suits similar in character to the present one, on the ground that the effect of a discharge in bankruptcy is a matter to be determined by any court in which the discharge may be pleaded.*

> See, for example, Hellman v. Goldstone, 161 Fed. 913; *In re* Marshall Paper Co., 102 Fed. 872, 874; *In re Weisberg*, 253 Fed. 833, 835; *In re* Havens, 272 Fed. 975. *To the extent that these cases conflict with the view just expressed they are clearly not in harmony with the general rule in equity announced by this court.*"

And we feel certain that this Court will place in the same category the case of *Hobbs v. Franklin Jewelry Co. Inc.* (1942, 5 Cir.), 131 Fed. (2d) 432 (which was followed by the District Judge in his minute order on review [R. 105] and followed by the Circuit Court of Appeals [R. 135]; and that this Court will disapprove the same. Our search discloses no Federal case in which this case has been followed except the case at bar.

And again in *Local Loan v. Hunt, supra*, at pages 243-244 of 292 U. S., this Court said:

> "To the foregoing array of authority petitioner opposes the decisions of the Supreme Court in *Illinois* in Mallin v. Wenham, 209 Ill. 252; 70 N. E. 564, and Monarch Discount Co. v. C. & O. Ry. Co., 285 Ill. 233; 120 N. E. 743. Undoubtedly, these cases hold, as petitioner asserts, that in Illinois an assignment of future wages creates a lien effective from the date of the assignment which is not invalidated by the assignor's discharge in bankruptcy. The contention is that even if the general rule be otherwise, this court is bound to follow the Illinois decisions, since the question of the existence of a lien depends upon Illinois law.
>
> "We find it unnecessary to consider whether this contention would in a different case find support in S. 34 of the Judiciary Act of 1789, now S. 725, Title 28, U. S. C., since we are of opinion that

it is precluded here by the clear and unmistakable policy of the banruptcy act. *It is important to bear in mind that the present case is one not within the jurisdiction of a state court, but is a dependent suit brought to vindicate decrees of a federal court of bankruptcy entered in the exercise of a jurisdiction essentially federal and exclusive in character. And it is that situation to which we address ourselves, and to which our decision is confined."* (Emphasis ours.)

After emphasizing that the purpose of the Bankruptcy Act is to afford the debtor a new opportunity in life, at page 245 this Court said:

"The various provisions of the bankruptcy act were adopted in the light of that view and are to be construed when reasonably possible in harmony with it so as to effectuate the general purpose and policy of the act. *Local rules subversive of that result cannot be accepted as controlling the action of a federal court."*

In concluding its decision the United States Supreme Court said:

" * * we reject the Illinois decisions as to the effect of an assignment of wages earned after bankruptcy as being destructive of the purpose and spirit of the bankruptcy act."*

The lower courts, in the instant case, did not attempt to determine whether or not the California decision as to the nature and legal effect of the judgment which was sought to be enforced against bankrupt's earnings after discharge, was *destructive of the purpose and spirit of the bankruptcy act,* although strongly urged so to do by the bankrupt. [R. 95-96, 108-109.] In so failing to

inquire, the District Court violated its plain duty as a federal court to determine the effect of its own decrees, to protect the sanctity of its judgments and to give a federal construction to a federal statute. Instead it abdicated its exclusive jurisdiction in favor of a state tribunal.

The Circuit Court of Appeals erred in approving such action, and in so doing failed to follow the *rule of decision in the Ninth Circuit* as definitely established and announced in:

Sims v. Jamison, supra;

Holmes v. Rowe, supra;

Lowe v. California State Federation of Labor, 189 Fed. 714;

San Francisco Shopping News Co. v. City of South San Francisco, 60 Fed. (2d) 879;

In re Pacific Alloy & Steel Co., 299 Fed. 952;

and in so doing the Circuit Court of Appeals *is in conflict with the decisions in other Circuits* following:

In re Skorcz (7 Cir.), 67 Fed. (2d) 187;

Davison, Paxon v. Caldwell (5 Cir. 1940), 115 Fed. (2d) 189;

Reynolds v. New York Trust Co. (1st Cir.), 188 Fed. 611;

John Deere Plow Co. v. McDavid (8th Cir), 137 Fed. 802;

Clark v. Rogers, 183 Fed. 518;

Harrison v. Foley, 206 Fed. 57;

In re Plotke (7 Cir.), 104 Fed. 964;

West Virginia v. Adams Express Co., 219 Fed. 794;

and in so ruling the Circuit Court of Appeals in this case has *refused to follow applicable decisions* of this Honorable Court, to-wit:

Local Loan Co. v. Hunt, supra;
Crescent Livestock v. Butchers Union, 120 U. S. 141;
Knickerbocker Ice Co. v. Stewart, 253 U. S. 149;
Neves v. Scott, 14 L. Ed. 141;
Roberts v. Northern Pac. Ry., 158 U. S. 1;
Bucher v. Cheshire Ry. Co., 125 U. S. 555;
United States v. Reynolds, 235 U. S. 133;
Tullock v. Mulvane, 184 U. S. 197;
Factors' and Traders Ins. Co. v. Murphy, 111 U. S. 738.

(2) THE BANKRUPTCY COURT HEREIN, IS NOT BOUND BY THE DOCTRINE OF RES ADJUDICATA ARISING FROM DECISIONS OF THE STATE COURT IN LITIGATION BETWEEN CREDITOR AND BANKRUPT.

The Referee *repudiated* the *doctrine of res adjudicata* as controlling in this case [R. 69]. The District Judge held that the decision of the Supreme Court of California on the subject should be held as binding on the Bankruptcy Court because the case turned upon a question of *California pleading* [R. 104] and then dismissed the petition *solely upon the ground that no unusual circumstances exist for assuming jurisdiction . . .*" [R. 105]. The Circuit Court of Appeals said the Referee was right and *affirmed his order in toto,* saying:

> *"thus appellant sought to relitigate in the Bankruptcy Court an issue which he had previously litigated in the Courts of California and which had there been determined against him. This he could not do."*

The Circuit Court of Appeals in its *short, and to say the least, unrevealing and incomplete opinion* seems to lay its *total emphasis* upon the fact herein that petitioner *litigated in the State Court* [R. 134, 135] saying,

> *"appellant did not at that time petition the Bankruptcy Court to enjoin the enforcement of appellee's judgment.* (Note 1: Cf. Local Loan Co. v. Hunt, 292 U. S. 234.) *Instead he moved the Superior Court for an order releasing the money received from the auditor."*

From the above language we assume that the *doctrine embraced* by the Circuit Court of Appeals in the opinion is the doctrine of *res adjudicata,* although they affirmed in toto the order of the Referee which was based upon an opinion *which repudiated the doctrine of res adjudicata.* In this the Circuit Court was in error as is shown by the fact that in its own decision treated hereinbefore *Holmes v. Rowe, supra* (9 Cir. 1938), it affirmed the granting of a permanent injunction by the Bankruptcy Court after the matter had been litigated *on motion of the debtor in the State Court and had there been decided adversely to him.* In all of the other cases we have cited hereinbefore on the question of jurisdiction the question of previous litigation by the same parties in the State courts has not been considered as at all determinative because of the undisputed exclusive jurisdiction of the Bankruptcy Court.

In the case of

Davison-Paxon Co. v. Caldwell, supra,

the parties and the issues in both the state and Federal Courts were the same. The facts of the case are strikingly similar to those in the case at bar.

There the Circuit Court of Appeals upheld the District Court's ruling that it was not bound by the judgment of the State Court as to whether a judgment was discharged in bankruptcy by reason of allegedly being a liability for obtaining money or property by false pretenses or false representation; and further that it was not bound by the decision of the State Court as to whether or not the facts alleging false pretenses or false representations were or were not properly pleaded. This case is directly in point.

The obvious and only question before the lower Court in the case at bar was a construction of the nature of the State Court judgment, and the application thereto of the provisions of a Federal Statute, to-wit: Section 17, Subd a(2) of the Bankruptcy Act. Naturally in eyeing the judgment and taking its measure any Court must look to the record and to the pleadings to determine the nature of the judgment. The Supreme Court of California did not comprehensively do this. It did only two things. First it decided that one count of the complaint properly charged fraud; and, second, it interpreted the language of the judgment "in accordance with the allegations of the complaint" to mean a confession of fraud.

But even in these considerations the Supreme Court of California was not passing on a question of pleading, but was construing a judgment, and was determining whether the Federal Statute could be so interpreted as to except the judgment from the effect of a discharge in bankruptcy.

This is not a question of local concern, nor of pleading, but is essentially one of construing the effect of a Federal Statute. In such circumstances our attention has been called to no case, and counsel cites none, and the lower Courts cite none, which holds that the Federal Court is

bound by a decision of the State Court, on a question of pleadings or otherwise.

With the great weight of authority holding that the Federal Court is the final arbiter in the construction of a Federal Statute, and that such problem is essentially Federal, it seems ludicrous to contemplate that this vast power of the Federal Courts should be emasculated merely because in the exercise of this power the Federal Court encounters a decision of a State Court which attempts to construe a Federal Statute, and in so doing violates all settled principles of law—or that the Federal Court is bound by the State Court decision because it incidentally involves pleadings in connection with determining the nature of the judgment.

That such is not the true state of the law was definitely decided in the said case of:

Davison-Paxon Co. v. Caldwell (supra.)

In that case a District Court of the United States came squarely at odds with a State Court on a question of law, towit: a construction of the character of a judgment from an examination of the pleadings, and declined to follow the State Court rule. We quote from page 189 of the opinion:

> "The suit was to enjoin the enforcement by garnishment against plaintiff of a state court judgment for debt. It was brought in the bankruptcy court on the ground that the debt had been discharged in bankruptcy, and because of the *settled but erroneous state of the decisions in Georgia,* plaintiff had been compelled to invoke the jurisdiction of the bankruptcy court. The defendant contested the suit on the ground (1) *that the matter was one for decision in the state courts and not for the in-*

vocation of the bankruptcy jurisdiction; (2) *that the judgment it had obtained was a conclusive adjudication that the debt was not discharged in bankruptcy. The district judge maintaining his jurisdiction on Hunt v. Loan Company* and determining the effect of the state court judgment *on the pleadings in that court,* concluded that the debt was dischargeable and had been discharged and granted the relief prayed."

Further (page 190):

"What was in question below, what is in question here is whether a debt created as this one was, *according to the allegations of the amended petition,* is such a liability." (Emphasis ours.)

Obviously both the District Court and the Circuit Court of Appeals classified the judgment as being dischargeable in bankruptcy solely upon an examination of the pleadings which supported the State Court judgment and then clearly declined to follow the Georgia decisions. Clearly then, the *Circuit Court of Appeals for the Ninth Circuit* in the case at bar *is in conflict* with the *Circuit Court of Appeals for the Fifth Circuit* in the *Davison-Paxon Co. v. Caldwell* case, from which we have just quoted.

(a) *The State Supreme Court Decision Is Not Res Adjudicata in the Federal Proceedings, as to the Effect of the Discharge in Bankruptcy, Because the State Court Has No Jurisdiction to Decide the Issues as Presented by Petitioner's Ancillary Bill in Equity* ***Herein.***

In *Freud's Estate,* 134 Cal. 333, 66 P. 476, the Court says:

"And then the court in that proceeding had no jurisdiction to determine the matter involved in a dis-

tribution. The probate court has exclusive jurisdiction of that, and cannot be deprived of its power in this way. The exclusive jurisdiction of that court over these matters was asserted in Goad v. Montgomery, 119 Cal. 552, 51 Pac. 681, 63 Am. St. Rep. 145; and it was so expressly held in Toland v. Earl, 129 Cal. 148, 61 Pac. 914. I cannot do better upon this proposition than to quote from Van Fleet on Former Adjudication (page 38): 'It was said in the Duchess of Kingston's Case that the judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter directly in question in another court.' The correct principle involved, in my opinion, in the phrase, 'court of concurrent jurisdiction,' was first formulated by a British court sitting in India, as follows: *'In order to make the decision of one court final and conclusive in another, it must be a decision of a court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is put in evidence as conclusive.'* This formula has been affirmed twice by the court of Indian appeals." (Emphasis ours.)

It is implicit in the doctrine of *res adjudicata* that the Court entering the judgment which is asserted as an estoppel must be one which has jurisdiction over the subject matter involved.

See, also, 34 *Cor. Jur.* 742; 34 *Cor. Jur.* 768, and cases there cited.

The California Court has no jurisdiction to determine a question such as is involved here concerning the effect of a discharge in bankruptcy upon a particular judgment. This is directly held in *Local Loan Co. v. Hunt* in answer

to the contention that it was necessary for the Federal Court to follow the Illinois decision:

> "We find it unnecessary to consider whether this contention would in a different case find support in S. 34 of the Judiciary Act of 1789 now S. 725, title 28 U. S. C., since we are of the opinion that it is precluded here by the clear and unmistakable policy of the Bankruptcy Act. *It is important to bear in mind that the present case is not one within the jurisdiction of a state court,* but it is a dependent suit brought to vindicate the decrees of a federal court of bankruptcy entered in the exercise of a jurisdiction essentially federal and exclusive in character. And it is that situation to which we address ourselves, and to which our decision is confined."

Further:

> "Petitioner relies upon a number of decisions where other federal courts sitting in bankruptcy have declined to entertain suits similar in character to the present one, on the ground that the effect of a discharge in bankruptcy is a matter to be determined by any court in which the discharge may be pleaded. (Citing cases.) To the extent that these cases conflict with the view just expressed they are clearly not in harmony with the general rule in equity announced by this court."

In so far as the Supreme Court of California assumed to pass on the effect of the discharge in bankruptcy it was wholly without the same jurisdiction as the Bankruptcy Court. The doctrine of *res adjudicata* is not applicable.

Creditor may say that bankrupt chose to submit to the State Court the effect of the discharge in bankruptcy and the nature of the cause of action and ensuing judgment.

But the petitioner never affirmatively sought the State Court forum; the effect of the discharge in bankruptcy became a serious factor only upon the decision of the Supreme Court of California. There was first a garnishment. Bankrupt, using the only defensive procedure provided, filed an affidavit [R. 65] requesting release of the funds, alleging (1) that he was a constitutional officer; (2) had been discharged in bankruptcy; (3) his salary was exempt. The Superior Court ruled that as a municipal officer bankrupt's salary was exempt. On appeal this order was sustained (*Wilson v. Walters*, 112 Pac. (2d) 964), holding that it was unnecessary to rule on the bankruptcy question. Creditor asked and received a hearing in the Supreme Court which unexpectedly raised the bankruptcy matter. To assert, therefore, that the bankrupt chose the state forum is not true. *When the Supreme Court of California in the first ruling in the entire case* in which the bankrupt was aggrieved, held that the bankrupt was not released from the judgment by the discharge in bankruptcy, the bankrupt *immediately sought* the intervention of the equitable powers of the Bankruptcy Court by the instant proceeding.

We must remember again that this was a *surprise ruling* of the California Supreme Court because, on the attachment issue, it overruled *Gamble v. Utley*, 86 Cal. App. 414 (which had long been the rule of decision in California), and on its ruling as to the nature of the State Court judgment it overruled the case of *Marr v. Superior Court*, 30 Cal. App. (2d) 275, 86 Pac. (2d) 141, relied upon by this petitioner, which had long been the rule of decision following *Crawford v. Burke*, 195 U. S. 176, and because the California Supreme Court in the Walters decision repudiated the decision of this Court in

Crawford v. Burke, supra. That decision was rendered on December 2, 1941, and at once (December 23, 1941) petitioner filed in the Bankruptcy Court his petition for an injunction on the ground that by his discharge he was released from the debt evidenced by creditor's judgment [R. 11].

This Court has recognized *unanticipated dispositions* of Federal claims in State Supreme Courts. In *Saunders v. Shaw,* 244 U. S. 317, 320, the Federal claim arose from the *unanticipated disposition* of the case at the close of the proceedings in the State Supreme Court. And in *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 678, the federal claim was based upon the *unanticipated act* of the State Supreme Court in giving to a statute a *new construction* which threatened rights under the Constitution by the *simple device of overruling one of its own decisions* which had long been the rule of decision in the State of Missouri and had been *consistently followed* for many years.

(b) *The State Supreme Court's Decision Is Not Res Adjudicata Because It Is Not a Final Judgment.*

In *American Nat. Ins. Co. v. Yee Lim Shee,* 104 Fed. (2d) 688, (9 cir.) the Court said: "No question becomes *res adjudicata* until it is settled by final and conclusive adjudication. 2 Freeman on Judgments, 2d Ed., Sec. 717, p. 1512; Calif. C. C. P., Sec. 1908," and see *Merriam v. Saalsield* 241 U. S. 22, 60 L. Ed. 868, 872.

The Court will note the final and remanding paragraph in the decision of *Wilson v. Walters,* 119 Pac. (2d) 340, 19 Cal. (2d) 132:

> "The affidavits with respect to what portion, if any, of defendant's salary is exempt from execution under the exemption laws (Code Civ. Proc., sec. 690.11) are conflicting and a determination on that issue should be made by the trial court. The order is reversed, with directions to the trial court to determine what, if any, portion of defendant's salary so levied upon is exempt under section 690.11 of the Code of Civil Procedure, and thereupon enter an order directing the disbursement of such portion to defendant, and any balance remaining to plaintiff in partial satisfaction of her judgment against defendant."

The doctrine adopted in the *Lim Shee* case, *supra,* is also the rule of decision in the State of California.

Pillsbury v. Superior Court, 8 Cal. (2d) 469, 66 Pac. (2d) 149; *Baker v. Eilers Music Co.,* 175 Cal. 652, 166 Pac. 1006; *Ricks Estate,* 160 Cal. 467, 117 Pac. 539; *Bank of America v. Superior Court,* 128 Pac. (2d) 357, *Stockton Works v. Glen's Falls Insurance Company,* 98 Cal. 557, in which the Court said: "There can be but one final judgment in an action, and that is one which in effect ends the suit in the court in which it is entered and finally determines the right of the parties in relation to the matter in controversy."

The State Court case of *Wilson v. Walters* is still pending in the Superior Court to which it was remanded, and wherein no final judgment has ever been entered and no further proceedings have been had.

(c) *The State Supreme Court Decision Is Not Res Adjudicata as to the Effect of the Discharge in Bankruptcy Because the Decision on Such Point Was Dictum.*

The entire decision of the Supreme Court of California relating to the pleadings, the judgment and the discharge in gratuitous *dictum*. The trial court held bankrupt's discharge did not release creditor's judgment. Bankrupt's motion to release garnishment was granted upon the sole ground that he was a municipal officer, not subject to garnishment. However, the trial court undertook to state as a matter of pure *dictum* that the discharge in bankruptcy was not a release. The order being in favor of the bankrupt, it was wholly unnecessary to rule upon the bankruptcy issue. *Bankrupt was not aggrieved* and therefore did not appeal from the *dictum*. The creditor appealed. The District Court of Appeal, affirming the Superior Court, stated: "This is the sole question necessary for us to determine: Is a Judge of the Municipal Court of the City of Los Angeles a Constitutional Officer of the State of California?" (*Wilson v. Walters,* 112 Pac. (2d) 964.) Thus the Appellate Court *did not examine* the bankruptcy question. The Supreme Court reversed the Appellate Court on the question it had decided. This was a sufficient basis for reversal of the order for it was the *only point upon which the order depended.* Therefore, the opinion and decision of the State Supreme Court upon the

subject of bankruptcy and the pleadings and judgment were unnecessary to its decision and were *dictum.*

Dictum cannot form the basis of any judgment upon which the doctrine of *res adjudicata* may be asserted. *Harriman v. Northern Securities Co.,* 197 U. S. 244, 49 L. Ed. 739, 761; *Cohen v. Virginia,* 6 Wheat. 399, 5 L. Ed. 290; *Carroll v. Carroll,* 16 How. 279, 14 L. Ed. 938; *Freeman on Judgments,* 5th Ed., Vol. 2, p. 1474.

II.

The Circuit Court Erred in Failing to Reverse the District Court for Failing to Make Any Findings of Fact Upon Which to Base its Order, Which Were Mandatory Under Rule 52a Federal Rules of Civil Procedure.

The findings of fact in this case, because of the turn of events in the succeeding proceedings before the Referee, District Judge and Circuit Court may be said to fall into *two categories*:

(1) Findings of fact on the merits;

(2) Findings of fact upon the circumstances of the case from which may be deduced conclusions of law upon the question of what unusual circumstances exist as to warrant the Court in taking jurisdiction.

The Referee made *partial and incomplete findings of fact* on the merits, but he did not make any findings of fact *concerning the circumstances* of the case which would enable the District Judge or the Circuit Court of Appeals to determine whether or not unusual circumstances existed.

In this connection reference is made to the allegations contained in bankrupt's petition to the District Court [R. 3] as follows:

In paragraph II thereof [R. 4]:

> ". . . that although duly notified of the proceedings in bankruptcy and having timely knowledge thereof, said Edith Maud Wilson failed to file a claim in said bankruptcy proceedings."

In paragraph III [R. 5]:

> "That the said Edith Maud Wilson despite such notice and knowledge did nothing with respect to the said liability nor did she at the subsequent hearing on your petitioner's discharge object to the same as she had ample right and power to do under Section 14 of the Bankruptcy Act."

And in paragraph VI [R. 7]:

> "Your petitioner alleges that the said Edith Maud Wilson threatens to, and unless restrained therefrom will proceed with the enforcement of the said judgment of the Superior Court against your petitioner and that if she is allowed to proceed with the enforcement of said judgment, such procedure would nullify the decree of this Honorable Court granting to your petitioner a final discharge from all of his debts and would circumvent the object and purposes of the Bankruptcy Act."

And in paragraph VII [R. 7-8]:

> "That your petitioner is a Judge of the Municipal Court of the City of Los Angeles having assumed that office on August 2, 1937, by appointment of the Governor of the State of California. That all of the salary of petitioner is necessary for the support of his dependents and himself, he being married and

having five dependents besides his wife, three of whom are minor children of school age, his oldest daughter being in her sophomore year in college, and his son being in the last elementary grade in a military academy. That continuous and unrelenting pursuit for the satisfaction of said judgment by said Edith Maud Wilson has caused and will conitnue to cause much damage to your petitioner because of the character of his position and the nature of his public duties. That the work of your petitioner is such that the harassment and annoyance of private litigation is disturbing to his work and the usual attendant publicity accompanying the exercise of the asserted rights of said Edith Maud Wilson to enforce execution of the judgment continues to damage your petitioner irreparably, particularly in view of the fact that your petitioner is by law an elective officer and subject to the will of the people at stated elections within the City of Los Angeles, and further in view of the fact that said Edith Maud Wilson continues to assert that said judgment is based in fraud and is not dischargeable in bankruptcy."

The Referee made no findings of fact concerning the above allegations while making certain findings on the merits.

But he dismissed the case, declining to take jurisdiction. [R. 90] If he did this he had no right to make findings on the merits—but he should have made findings upon the circumstances as disclosed by the evidence which would be controlling on the question of jurisdiction (if he must pursue such a theory).

The District Judge reversed the findings of fact and conclusions of law on the merits, evidently because [R. 104]

(1) he did not agree with them (except on the question of dismissal because of the lack of unusual circumstances);

(2) He felt that findings on the merits were improper if the Court did not assume jurisdiction.

The District Judge then dismissed the petition on the ground that no unusual circumstances existed for assuming jurisdiction, therefore making a conclusion of law based upon findings of fact which did not exist for two reasons:

(1) He vacated all the findings of fact made by the Referee;

(2) The Referee never did find any facts concerning the allegations of *unusual circumstances* as we have just hereinbefore pointed out.

The Circuit Court of Appeals received the case with no findings before it. Petitioner raised the point of findings before the Circuit Court which Court, evidently answering the point, reinstated (we suppose) the findings of fact made by the Referee.

But the case cannot be thus disposed of, and the Circuit Court committed manifest error in so doing because:

(1) It in effect reinstated findings of fact and conclusions of law without giving petitioner an opportunity to attack them and without giving petitioner the benefit of review by said Circuit Court of said findings. Such review of the merits on appeal by the Circuit Court *is a matter of right* enjoyed by petitioner and sustained by

Judicial Code, Section 128, as amended (28 U. S. C. A. Sec. 225), but petitioner now stands *deprived of such right.*

(2) It affirmed the Referee in dismissing the case upon his holding that no unusual circumstances existed for the assumption of jurisdiction, when the Referee *had not made any findings of fact concerning the total of the circumstances revealed by the evidence.*

Rule 52-a of the Federal Rules of Civil Procedure provides in part as follows:

> "In all actions tried upon the facts without a jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; . . ."

The failure of the lower Court to comply with the above rule is manifest error. It has been held that fair compliance with this rule is of the highest importance to proper review of a Court's action in granting or refusing an injunction. In the case of:

> *Mayo v. Lakeland Highlands, etc. Co.*, 309 U. S. 310, 60 S. Ct. 517, 84 L. Ed. 774,

this Court said (at p. 316):

> "The observations made in the course of the opinion are not, in any proper sense, findings of fact upon these vital issues. Statements of fact are mingled with arguments and inferences for which we find no sufficient basis either in the affidavits or the oral testimony.

"It is of the highest importance to a proper review of the action of a court in granting or refusing a preliminary injunction that there should be fair compliance with Rule 52 (a) of the Rules of Civil Procedure."

Further (page 317):

"Moreover, if appellants conceived themselves aggrieved by the action of the court upon motion for preliminary injunction, they were entitled to have explicit findings of fact upon which the conclusion of the court was based. *Such findings are obviously necessary to the intelligent and orderly presentation and proper disposition of an appeal.*" (Emphasis added.)

Further (page 319):

"We reverse the decree and remand the cause to the court below with instructions that, if the motion for interlocutory injunction is pressed, the parties, if they desire it, may be afforded a further hearing, *and any action taken by the court shall be upon findings of fact and conclusions founded upon the evidence, in accordance with Rule 52(a) of the Rules of Civil Procedure.*" (Emphasis added.)

And the Circuit Court of Appeals for the 9th Circuit very recently ruled upon the same point in the case of:

Perry v. Bauman, 122 Fed. (2d) 409, 410,

wherein it said:

"Thus each of the motions raised issues of fact. The issues were tried by the court without a jury. Evidence was received and, upon consideration there-

of, the following order was entered: 'Motion to dismiss proceedings granted.' The order did not state, nor does the record show, which of the several motions to dismiss was granted, nor on what ground or grounds dismissal was ordered. The Court made no findings, stated no conclusions. Order 37 of the General Orders in Bankruptcy, 11 U. S. C. A. following section 53 provides: 'In proceedings under the (Bankruptcy) Act the rules of Civil Procedure for the District Courts of the United States (28 U. S. C. A. following section 723 c) shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be.' Rule 52(a) of the Rules of Civil Procedure provides: 'In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.' Rule 52(a) is not inconsistent with the Bankruptcy Act or with the General Orders in Bankruptcy. It therefore should have been followed in this case.

"Order reversed and case remanded to the District Court, with directions to find the facts specially, state separately its conclusions of law thereon and direct the entry of the appropriate judgment, all in conformity with Rule 52(a), *supra*."

The following is appended to the opinion under note 2:

"The evidence consisted of eight affidavits—four supporting and four opposing the motions to dismiss."

III.

The Debt Represented by the Judgment of Creditor Against Bankrupt Is Not a Liability for Obtaining Money or Property by False Pretenses or False Representations, Within the Meaning of Section 17(a)2 of the Bankruptcy Act (11 U. S. C. A., Sec. 35) But Is a Liability Ex Contractu, and Therefore Discharged.

In order to determine this question we first look at the wording of the judgment [R. 46]. If any wording of the judgment is so ambiguous as to create a doubt as to its nature then the Court shall look to all of the pleadings in this case to determine the nature of the judgment. (1 C. J. S. P. 1100, Par. 46.)

The California Supreme Court (*Wilson v. Walters*, 19 Cal. (2d) 111), interprets this judgment as being one for obtaining property by false pretenses or false representations by relying upon the clause therein contained "in accordance with the allegations of the complaint." Assuming that it is proper to separate this individual clause from its context (which we do not concede) it is immediately apparent from an examination of the record in the case *that these words relied on by that Court to interpret the nature of the judgment are the very words which render the judgment ambiguous.*

A consent judgment is a contract and shall be construed as such. (34 *C. J.* 133 (*Corpus Juris*).) And especially is this judgment a contract because it is based on a stipulation therefor and the stipulation is a contract —and it must be construed by the rules governing the construction of contracts to make a valid contract. In this case a valid stipulation for judgment must be (1) parties;

(2) legal subject matter; (3) and a valid consideration, and as to all of the necessary elements there must be a *meeting of the minds.* Do the words *"in accordance with the allegations of the complaint"* present such a *clear, precise and unambiguous statement as to the basis for the judgment* as to suggest that there was a meeting of the minds thereon?

> "A judgment by consent, being regarded as a contract between the parties must be construed as any other contract. Its operation and effect must be gathered from the terms used in the agreement, and it should not be extended beyond the *clear import of* such terms."
>
> 34 *Corpus Juris,* 133, Sec. 337.

This is also true of the same clause in the stipulation for judgment [R. 44]: "In accordance with the allegations of the complaint." These are not descriptive words nor are they *words of admission* but they serve only the purpose of *reference*—they are *directional* words that point the way in *very general language* to the "allegations of the complaint."

To what allegations?

It does not say *"all"* of the allegations in the complaint.

It does not say *which* of the *conflicting* allegations shall be preferred above the others.

It does not say which of the *obviously conflicting* theories shall be adopted or which shall be discarded.

It does not say which of the *obviously conflicting* causes of action shall be adopted as being the *gravamen* or *gist* of plaintiff's claim or which shall be disregarded.

To *what allegations* of the complaint does this language in the judgment point? We ask it again and again—The only logical answer is: Viz: To the *material* allegations of the complaint. What are the material allegations of the complaint? They are the allegations which are *necessary and material* to the *statement* of the *gravamen or gist* of the complaint. *All other allegations are surplusage.*

Since the judgment does not solve the problem by the use of these words and since the stipulation for judgment does not solve the problem by the use of these words, plaintiff in the case cannot rely on them, nor can the Supreme Court of California attach the *onus of fraud* to this defendant by their use alone.

We must go beyond these words to the complaint itself. The Supreme Court of California did not go that far back nor did the District Court nor the Circuit Court, but we think this Court will.

Only one question is here, viz: What is the *gravamen* of the complaint? Did plaintiff rely *when filing the complaint* upon a cause of action *ex delicto* or one *ex contractu.* It is fundamental that she could not do both.

For the answer to this question we examine the complaint, its title, its allegations and its prayer, as to the remedy sought.

After we examine the complaint and pleadings if *ambiguity still remains* so that it is not clear whether the action is *ex contractu* or *ex delicto* then under the law it

must be presumed to be an action *ex contractu* because the construction should be against the pleader, and the liability in contract is *less extensive than the liability in tort.*

Nathan v. Locke (1930), 108 Cal. App. 138, 287 Pac. 555;

May v. Georger, 47 N. Y. S. 1057, 1059.

A. The Judgment of Creditor Against Bankrupt [R. 46] in Apportioning Damages Between the Two Co-defendants Is Indisputably a Judgment on Contract.

A most persuasive argument on this point is set forth in the order of the District Judge in this cause below, vacating submission and setting cause for reargument [R. 101-102]. We quote:

"A study of the record on review suggests the following considerations:

The second cause of action which charged misrepresentation in obtaining the loan advances was, like the other three, directed at both defendants. Judgment was prayed for jointly against both defendants for the principal sum of $6430.00, although the amount was split up in several sums for the computation of interest. The damage alleged to flow from the misrepresentations in the second cause of action was the sum of $6430.00, being the total sum alleged to have been advanced in the other counts of the Complaint.

We thus have through the Complaint a prayer for a judgment *in solido* against both defendants. In the stipulation for judgment, which was carried into the judgment, there was a segregation of liabil-

ties and judgment was stipulated to be rendered and then rendered jointly against Walters and Johnston in the sum of $5700.00, with interest at seven per cent from September 28, 1929, and then against Johnston individually for the balance of $730.00, divided into three sums for the purpose of computing interest. It is the law of the United States and the law of California that the liability of joint tort feasors cannot be segregated and that only one judgment can be entered. (Washington Gas & Light Co. v. Lansden, 1898, 172 U. S. 534, 552-53; Reynolds v. New York Trust Co., 2 Cir., 1911, 188 Fed. 611; Miller v. Union Pacific Ry., 1933, 290 U. S. 227; Bee v. Cooper, 1932, 217 C. 96; Curtis v. San Pedro Transportation Co., 1935, 10 C. A. (2) 547; Phipps v. Superior Court, 1939, 32 C. A. (2d) 371.)

As the second cause of action alleged misrepresentations by both defendants and sought judgment against both for the total debt of $6430.00, does not the fact that the stipulation for judgment and the judgment divided the liability by awarding judgment against both defendants jointly for $5700.00 and against the defendant Johnston alone for $730.00, indicate that the judgment stipulated to was one for money loaned and advanced on a contractual basis, rather than a judgment awarding damages for a tort?

In view of the fact that damages in tort cannot be apportioned as between joint tort feasors according to their degree of participation, does not the fact that, despite the charge against both, the judgment proceeds to make such apportionment indicate that it was not a judgment on a cause of action for tort?"

Neither counsel, nor the lower Courts has by citation of authorities or otherwise assailed the correctness of the above memorandum opinion, and we submit there is no answer to it. It also has support in the following cases:

Thompson v. Catalina, 205 Cal. 402, citing:
Davis v. Hearst, 160 Cal. 143;
Oldham v. Aetna Ins. Co., 17 Cal. App. (2d) 144;
Sparks v. Bernstein, 19 Cal. (2d) 308.

B. A Further Analysis of the Complaint [R. 28, 43] on Which the State Court Judgment Is Based Clearly Shows That the Action Is Contractual in Its Nature, and By the Overwhelming Weight of Authority the Complaint and Resulting Judgment Sound in Contract.

Said complaint was in four counts and was entitled "Complaint for Damages and for Breach of Contract."

The first cause of action may be described as one on an express promise to repay money loaned.

The second cause of action contains certain allegations concerning false representations.

The third cause of action is an action upon a promissory note.

The fourth cause of action is upon money loaned.

It is clearly apparent that *three* of the *four causes of action* stated in the complaint are actions *ex contractu.* The relief prayed is for judgment as upon the causes of action *ex contractu,* including the *specific amounts* set forth in the *contracts* pleaded.

It should be noted that the prayer *requests attorney's fees,* which are stipulated in the contracts pleaded, and further requests *interest at 8 per cent, as stipulated in*

the contracts pleaded, and does not request interest at the legal rate.

It should be further noted that *no other recovery is requested* in the way of damages, or otherwise, than the *normal recovery under the contracts.*

In *May v. Georger,* 47 N. Y. S. 1057, the Court said:

> "If there is any doubt as to whether an action is in contract or tort, it must be resolved against the pleader and the complaint held to be one in contract, as the liability is less extensive."

The policy of the law both in California and throughout the United States is well settled in regard to the "yard sticks" which may be applied in determining whether an action is *ex contractu* or *ex delicto,* it frequently and for a variety of reasons becoming necessary to determine whether a particular action *sounds in contract or in tort.* The effect of a bankrupt discharge is but one of these reasons, other reasons being the right to a writ of attachment, whether a cross-complaint may be interposed, whether the right of contribution exists, whether the release of one defendant operates as a release of others, and whether or not certain types of relief or forms of damages may be granted.

In *Nathan v. Locke,* 108 Cal. App. 158, 287 Pac. 550 (1930), plaintiff sued for contribution against defendants upon a final judgment which he had paid. The one issue involved in the appeal was whether the action, in which the judgment was rendered, was *ex contractu* or *ex delicto,* it being conceded that in California there is no right of contribution between joint tort-feasors. Therefore, if the action is one in tort, the respondent may

not seek contribution from the appellants. The Court says:

> "Another rule which is universally accepted in determining the nature of an action of this kind is that, when it is not clear to which class the action belongs, *it will ordinarily be construed as in contract rather than in tort. 1 C. J. 1015. The reason for this rule is that the construction should be against the pleader and the liability in contract is less extensive than the liability in tort. May v. Georger,* 21 Misc. Rep. 622, 47 N. Y. S. 1057, 1059. Another guide is noted in 1 Corpus Juris, p. 1016, where it is said: 'Where a complaint states a cause of action in contract and it appears that this is the *gravamen* of the complaint, *the nature of the action is not changed by the fact that there are also allegations in regard to tortious conduct on the part of defendant.* * * *'" (Emphasis ours.)

In *Hill v. Superior Court,* 16 Cal. (2d) 527, there was a motion to vacate an attachment and the issue was whether the complaint containing six causes of action stated a cause of action in contract. The Court said:

> "On the other hand, where the facts show a misappropriation of funds one may waive the tort and sue upon an implied contract for money had and received. *Bechtel v. Chase,* 156 Cal. 707, 106 P. 81; *Hoare v. Glann,* 176 Cal. 309, 168 P. 346; *Philpott v. Superior Court,* 1 Cal. 2d 512, 36 P. 2d 635, 95 A. L. R. 990. Such an action is based upon the tort of embezzlement, yet the action is one *ex contractu,* in which the plaintiff may have a writ of attachment. *Los Angeles Drug Co. v. Superior Court,* 8 Cal. 2d 71, 63 P. 2d 1124; *McCall v. Superior Court,* 1 Cal. 2d 527, 36 P. 2d 642, 95 A. L. R. 1019."

In *Dougherty v. California Kettleman Oil Royalties,* 13 Cal. (2d) 174, appellant contended that one Ochsner was a joint tort-feasor, and that an agreement between respondent and the representative of Ochsner's estate constituted a settlement of a tort action, releasing all other tort-feasors, and therefore that appellant was released from liability under a judgment. The Court said:

> "In our opinion, the rule and theory of *Bee v. Cooper, supra,* and the other cases cited by appellant, have no application to the facts of the instant case, for the reason that the allegations of the complaint, the theory of the parties on the trial and on appeal, and the rationale of the opinion of this court, clearly demonstrate that basically the action sounds in contract and not in tort. Dougherty was not seeking damages based upon the fraud of appellant, but was seeking to have it determined that the appellant held the title to the royalties in trust for him. That action was basically predicated upon respondent's written but unsigned contract with Ochsner. *The contract was the sine qua non of the cause of action.*
>
> "A reading of this court's opinion on the prior appeal conclusively demonstrates the cause of action sounds in contract.
>
> "It is true that under the facts of the case Ochsner and appellant *acted fraudulently* in concealing the existence of the Coast Land Company deal from Dougherty, and in the manner in which they dealt with the royalties. These facts are alleged in the complaint and recounted in the opinion of this court as part of the facts of the case. *The cause of action, however, was not predicated on that fraud.* It would have existed whether or not such actual fraud was present. It is also true that under the pertinent provisions of the Civil Code (sec. 2228 *et seq.,*

see particularly sec. 2234) it is a fraud upon the beneficiary for a trustee to transfer trust property to another without protection and in violation of the beneficiary's rights. *There can be no doubt that Dougherty could have sued Ochsner and appellant for damages for this and the other frauds, but the point is he did not, but elected to sue for the enforcement of his contract with Ochsner. It is elementary that a person injured under circumstances where he may sue in either tort or contract, may waive the tort and sue on the contract. Stanford Hotel v. Schwind Co.,* 180 Cal. 348, 181 P. 780; *Philpott v. Superior Court,* 1 Cal. 2d 512, 36 P. 2d 635, 95 A. L. R. 990. These same cases establish that the *mere fact a pleading contains allegations of fraud does not convert a contract action into a tort action.*" (Emphasis ours.)

In *Los Angeles Drug Co. v. Superior Court in and for Los Angeles County,* 8 Cal. (2d) 71, 65 Pac. (2d) 1124 (1936), the question involved was whether a writ of attachment should issue.

The Court said:

"It is well settled that where personal property is converted the injured party may 'waive the tort and sue in assumpsit.' *Bechtel v. Chase,* 156 Cal. 707, 711, 106 P. 81, 83; *Corey v. Struve,* 170 Cal. 170, 172, 149 P. 48, 49, and *Hoare v. Glann,* 176 Cal. 309, 313, 168 P. 346. Nor is the aggrieved party in this jurisdiction limited, as he is in some others, to those cases where the wrongdoer has sold or converted the property into money.' *Bechtel v. Chase.*

"Does the complaint here declare in assumpsit? In *Corey v. Struve, supra,* the allegations of the complaint were in all material respects identical with

those now before us, and the court said: 'While the complaint does allege that the property was "converted" by the defendants, we think that the action was in reality one in assumpsit for the value of the property sold, or perhaps it might be more aptly characterized as one in the nature of a suit for money had and received.' It is manifest from the allegations that plaintiff is seeking to receive the reasonable value of the goods taken. This is sufficient to characterize its complaint. In other words, while the tort is the cause of injury, yet the action is one *ex contractu.*"

And see:

Chapman v. State, 104 Cal. 690, 38 Pac. 457, 458;

Stark v. Wellman, 96 Cal. 400, 31 Pac. 259, 260.

C. The Complaint in the State Court Action Sounding in Contract, Creditor, by Bringing Her Action in Such Form, Waived the Alleged Fraud and Sued in Contract.

(1) THIS IS TRUE UNDER EXISTING CALIFORNIA LAW WHICH THE SUPREME COURT OF CALIFORNIA FAILED TO FOLLOW (*Wilson v. Walters,* 19 Cal. (2d) 111).

We feel that the California Supreme Court settled this question in bankrupt's favor some years ago, when it reached a point in the history of California jurisprudence where it became necessary to settle the law as to the right of a plaintiff to a writ of attachment, where fraud is alleged in one count of the complaint and there is also included a count for money had and received. Two cases decided on the same day by reference one to the other, form a complete analysis of the situation confronting the court at that time. Because of their extreme length,

we refrain from quotations at this place, but respectfully suggest that an examination of them by this Honorable Court will fully justify the position of bankrupt in this matter as *to waiver of tort,* where, as in the instant case, the complaint [R. 28] *declared in inconsistent counts of both tort and contract.* We refer to:

Philpott v. Superior Court, 1 Cal. (2d) 512 (1934), **and**

McCall v. Superior Court, 1 Cal. (2d) 527.

And on the same point:

In *California Treasure Box v. Superior Court,* 2 Cal. App. (2d) 202, 37 Pac. (2d) 731 (1934), the court said:

> "It is alleged in the complaint that corporate stock was purchased by plaintiff under defendant's false pretenses and that plaintiff promptly rescinded. The prayer is for the return of the purchase money paid with interest. The facts bring the issue strictly within the principle expressed in *McCall v. Superior Court,* 1 Cal. (2d) 527."

At 1 *C. J. S.,* page 1100, paragraph 46, it is said:

> "While the *prayer for relief or measure of damage sought* does not necessarily determine the character of the action, nor is it binding or conclusive, it may be material in the determination of the question and is, therefore, entitled to consideration, *and in case of doubt, will often determine the character of the action,* and indeed there are actions whose character is necessarily determined thereby; thus where a *relief* or a *measure of recovery is sought* which is adapted to one form of action only, the action will be considered as such. Where under the circumstances, either form of action might be maintained, it must be determined from the allegations of the complaint what is the

gravamen of the complaint and substance of the cause of action relied on. Where a complaint states a cause of action in contract and it appears that this is the *gravamen* of the complaint, the nature of the action as *ex contractu* is not affected or changed by the fact that there are *also allegations in regard to tortious conduct on the part of the defendant such as allegations in regard to negligence, or fraud, or conversion, which in such cases may be disregarded as surplusage. Hence although an action be in form as for a tort, yet if the subject of it be based on contract the suit will be attended by all the incidents of an action ex contractu.*" (Emphasis ours.)

It should be remembered that in the case at bar, both the prayer for relief [R. 43] and the form of the judgment [R. 46-47] are in their nature applicable *only to contractual actions.* The complaint [R. 28] is also denominated "Complaint for damages and for breach of contract."

In the case of *Beatty v. Pac. States Savings & Loan Co.*, 4 Cal. App. (2d) 695, the court said in part:

> "We do not think, however, that the rule permitting the pleading of inconsistent causes of action in the same complaint was ever intended to sanction the statement in a verified complaint of certain facts as constituting a transaction in one count or cause of action, and in another count or cause of action a statement of contradictory or antagonistic facts as constituting the same transaction. In short, the rule does not permit the pleader to blow both hot and cold in the same complaint on the subject of facts of which he purports to speak with knowledge under oath.

"(3) Under the rules above stated it became the duty of the trial court herein, upon the close of the evidence, to decide which of the antagonistic causes of action had been sustained, and in so deciding the court was required to take as true the averments in the complaint which bore most strongly against the pleader, and which were sustained by proofs in the form of evidence or admissions of the pleadings."

The Federal courts have definitely indicated that the prayer of the complaint is important in determining the character of an action. As was said by the District Court below, in the case of *Wenzel & Henoch Construction Company v. Metropolitan Water District*, 18 Fed. Supp. 616, 619, speaking through Judge Yankwich:

"It is apparent from the motion that the defendant treats the first cause of action as if it sought to rescind and cancel the opinion and notice. There is no prayer in the complaint to that effect."

Further in the same case on page 621, Judge Yankwich says:

"If we apply the touchstone of the principles to the first count of the complaint, it is evident that the plaintiff does not seek equitable relief. It seeks damages from the District for breach of contract."

We submit that exactly the same type of relief is sought by the complaint here under consideration and no other.

And in a case just decided by the Circuit Court of Appeals for the Eighth Circuit:

Peitzman v. City of Illmo (Apr. 17, 1944), 141 Fed. (2d) 956, 962,

the Court announced the same theory although the situation was opposite from the case at bar as to facts. The Court says:

> "In case of doubt as to the nature of the cause of action, the *prayer* of the complaint may be looked to and where the damages sought, whether exemplary or punitive, are inconsistent with an action for damages on breach of contract, but are consistent with an action sounding in tort and the complaint may otherwise sustain such construction, it will be considered that plaintiff intended to sue in tort."

(2) AND THE DOCTRINE OF THE WAIVER OF FRAUD HAS BEEN ACCEPTED AND FOLLOWED IN BANKRUPTCY CASES (BEGINNING WITH CRAWFORD V. BURKE, 195 U. S. 176, WHICH CASE WAS EXPRESSLY REPUDIATED BY THE CALIFORNIA SUPREME COURT (WILSON V. WALTERS, 19 CAL. (2D) 111) AND BY OVERRULING MARR V. SUPERIOR COURT, 30 CAL. APP. (2D) 275, 86 PAC. 141).

In the case of *Collins v. McWalters,* 72 N. Y. S. 203, 6 A. B. R. 593, it is said (p. 595):

> "The bankruptcy law of 1898 exempts from discharge 'judgments in actions for fraud.' Section 17, subd. 2. But this provision appears to apply only to cases where fraud is the gravamen of the action, and *in which proof of fraud is essential to recovery,* and does not include a judgment rendered in an action in which the right of recovery is based upon an act not essentially fraudulent, although fraud may be incidentally shown." (Italics ours.)

It cannot be said that fraud is the *gravamen of the instant action,* or that proof of fraud was *essential to recovery.*

In the *Matter of Arkell*, 72 N. Y. S. 555, 6 A. B. R. 650, defendant judgment debtor made a motion to vacate the judgment on the ground that it had been discharged in bankruptcy. The case is somewhat similar to that at bar in that a stipulation for judgment was entered into after the filing of the complaint. There were various allegations of misrepresentation which the court stated were somewhat indefinite in their nature. The court said (p. 652):

> "The cause of action alleged was for a breach of a contract by the defendants; and, so far as a recovery in the action is concerned, the allegations of misrepresentations were merely surplusage, and did not at all affect the right of the plaintiffs to recover."

In the case of *Hargadine-McKittrick Dry Goods Co. v. Hudson*, 6 A. B. R. 657, the action was on a judgment to which the defendant pleaded a discharge in bankruptcy. The case is similar in that the suit involved promissory notes and the claim was made that the discharge was unavailable because of fraud. The court said (p. 659):

> "Where a note is founded in fraud, two remedies exist. The holder may waive the contract and sue for the fraud, or he may sue upon the note and waive the fraud. The plaintiff in this case chose the latter course, and took its judgments on the notes."

Another leading case upon this subject is *Sanger Bros. v. Barrett*, 221 S. W. 1087, 45 A. B. R. 543. Appellants claimed that the respondent's bankruptcy did not relieve him from liability. The court stated that the appellants had the right to waive the tort and rely upon the contract, thereby rendering the claim based on the contract prov-

able, which contract was discharged in the bankruptcy court.

The leading case on the point of waiver of fraud so as to render a claim dischargeable in bankruptcy is *Crawford v. Burke,* 195 U. S. 176, 49 L. Ed. 147. *The case is on all fours with the case at bar.* The action was to recover damages for the willful and fraudulent conversion of plaintiff's interests in shares of stock. There were *ten counts* in the declaration. The *first five* counts alleged that defendants, employed as brokers and in possession of certain securities of plaintiff, wilfully, wrongfully and *fraudulently,* and *with intent to cheat and defraud plaintiff,* converted his stock to their use. The last five counts allege that after the willful and fraudulent conversion defendants fraudulently represented to plaintiff that they still had the stock and by fraudulent representations secured from plaintiff an additional large sum of money as margins. The defendants pleaded their discharge in bankruptcy, contending plaintiff's claims were provable and plaintiff averred that the claims were excepted from the operation of the discharge.

This Court reversed the judgment of the Supreme Court of Illinois, saying:

> "We are, therefore, of opinion that if a debt originates or is 'founded upon an open account, or upon a contract, expressed or implied,' it is provable against the bankrupt's estate, though the creditor may elect to bring his action in trover, as for a fraudulent conversion, instead of in assumpsit, for a balance due upon an open account. It certainly could not have been the intention of Congress to extend the operation of the discharge under Sec. 17 to debts that were not provable under Sec. 63a. It results from the

> construction we have given the latter section that all debts originating upon an open account, or upon a contract, express or implied, are provable, though plaintiff elect to bring his action for fraud."

We submit the above case as *decisive* of the case at bar inasmuch as the claim in the instant case arose upon an express contract provable in the bankruptcy, to-wit, the promissory notes.

The case of *Crawford v. Burke, supra*, has never been overruled and has been consistently cited with approval and the principal thereof upheld in each of the following cases: *Tindle v. Birkett*, 205 U. S. 183, 51 L. Ed. 762; *Clark v. Rogers*, 228 U. S. 534, 57 L. Ed. 953; *Kreitlein v. Ferger*, 238 U. S. 21, 57 L. Ed. 1184; *Grant Shoe Company v. W. M. Laird Company*, 212 U. S. 445, 53 L. Ed. 591; *Schall v. Camors*, 251 U. S. 239, 64 L. Ed. 247; *Brown v. O'Keefe*, 300 U. S. 598, 81 L. Ed. 827.

The above case was followed in California in *Marr v. Superior Court*, 30 Cal. App. (2d) 275, 86 Pac. (2d) 141, until the Supreme Court of California in *Wilson v. Walters*, 19 Cal. (2d) 111 overruled *Marr v. Superior Court*, and in so doing repudiated *Crawford v. Burke, supra*.

The facts in said *Marr v. Superior Court, supra*, are almost identical with those in the case at bar. The complaint set up various allegations of fraud, in addition to the ordinary allegations of a promissory note. The answer, as in our case, denied all of the allegations charging fraud and deceit. The Court held that the discharge in bankruptcy of defendant was a *meritorious defense*, citing specifically *Crawford v. Burke, supra*, and also *Tindle v. Birkett*, 205 U. S. 183. Then in *Wilson v. Walters, supra*, the Supreme Court of California *in reversing*

Marr v. Superior Court repudiated *Crawford v. Burke, supra,* and *Tindle v. Birkett, supra,* both decisions of this Honorable United States Supreme Court, in direct point) upon the theory that *Crawford v. Burke* and *Tindle v. Birkett* were rendered *inapplicable* because of the 1903 amendment to the Bankruptcy Act.

However, each of the above cited cases decided by this Honorable Court beginning with *Clark v. Rogers, supra,* was decided long after the 1903 amendment to the Bankruptcy Act which puts the Supreme Court of California in complete error in its analysis of the binding effect of *Crawford v. Burke.*

Tindle v. Birkett, supra, carried the rule of *Crawford v. Burke* into and made it directly applicable to those cases involving fraud without reference to persons acting in a fiduciary capacity.

In 1913, some *ten years* after the 1903 amendment to Section 17 of the Bankruptcy Act we find the case of *Clark v. Rogers, supra,* expressly approving and following not only *Crawford v. Burke, supra,* but also *Tindle v. Birkett, supra,* so that the doctrine of both cases is therein expressly carried by this Honorable Court beyond the 1903 amendment to the Bankruptcy Act. Following the *Clark* case the *Crawford* case was approved in *Kreitlein v. Ferger, supra* (decided June 1, 1915), wherein this Honorable Court said:

> "It seems to have been claimed that the judgment was not a provable debt within the meaning of sec. 63a (4), of the bankruptcy act. But the special find-

ing of the jury in that case showed that in purchasing the flour Kreitlein had not made any fraudulent concealment or misrepresentation as to his financial condition. *Besides, the judgment was a provable debt even though rendered in a suit where the creditor had elected to bring an action in trover, as for a fraudulet conversion, instead of assumpsit for a balance due on open account. Crawford v. Burke,* 195 U. S. 177, 193, 49 L. ed. 147, 153, 25 Sup. Ct. Rep. 9." (Italics ours.)

In the case of *Grant Shoe Co. v. W. M. Laird Co., supra,* the court said:

"On the other hand, by the equally express words of sec. 63a, among the debts that may be proved are those founded upon a contract, express or implied. Again, by sec. 17, the discharge is of all 'provable debts' with certain exceptions, and it would not be denied that this claim would be barred by a discharge. Tindle v. Birkett, 205 U. S. 183, 51 L. Ed. 762, 27 Sup. Ct. Rep. 493."

The case of *Schall v. Camors, supra,* which cites with approval the *Crawford, Tindle, Clark* and *Grant Shoe* cases, holds that where, by means of a tort, the tort feasor obtains something of value for which an equivalent price ought to be paid, even if the tort as such be forgiven, there may be a provable claim *quasi ex-contractu,* and further holds that the only *ex-delicto* claims which Section 63 does not authorize the liquidation and proof of are those unaffected by contract, express or implied.

D. The Burden of Proof in This Case Is Upon the Creditor to Establish That the Judgment Is Excepted From the Operation of Bankrupt's Discharge, and This Burden Has Not Been Sustained.

We quote from *Collier on Bankruptcy*, 14th Edition, Vol. 1, at page 1606:

> "In order that a judgment based upon a fraudulent representation may be excepted from the operation of a discharge, the *record in the action must show that fraud and deceit were the 'gist and gravamen'* of the action. . . ."

And on page 1608 of the same volume, we quote:

> *"The burden of proof, however, is upon the creditor who claims that his duly scheduled debt is excepted from the operation of the discharge in bankruptcy because of the false representations or pretense."* (Emphasis ours.)

And again we quote a portion of Section 17.31 beginning on page 1669 of the same volume:

> "The introduction in proof of a certified copy of an order of discharge makes out a *prima facie* defense, and the *burden of proof rests with the plaintiff to show that, because of the nature of the claim, the debt sued upon was excepted by law from the operation of the discharge."* (Emphasis ours.)

In *Guindon v. Brusky* (Supreme Court, Minn. 1919), 170 N. W. 918, 919, the court said:

> "One other consideration may be noted. It is conceded that the complaint states a cause of action on contract. It must be conceded that a right of recovery on contract was submitted to the jury. *Let it be assumed that there was alleged in the complaint and submitted to the jury a right of recovery for obtaining property by false pretenses or false repre-*

sentation; and that the jury might have found for the plaintiff *upon one or the other*, or even on both if they were not so inconsistent as to prevent it.

"The burden of proof is upon the creditor who claims that his duly scheduled debt is excepted from the operation of the discharge. Van Norman v. Young, 228 Ill. 425, 81 N. E. 1060; *In re* Grount, 88 Vt. 318, 92 Atl. 646, Ann. Cas. 1917A, 210; *In re* Levitan (D. C.), 224 Fed. 241; Hallagan v. Dowell, 179 Iowa, 172, 161 N. W. 177; Burnham v. Noyes, 125 Mass. 85; Sherwood v. Mitchell, 4 Denio (N. Y.) 435. *If under the pleadings and the charge a judgment might be based on contract, or on fraud, and there is nothing but the pleadings and charge upon which to determine the fact, the party having the burden of proving the one or the other fails to sustain it, and so* does not prove his cause of action or defense. See Hallagan v. Dowell, 179 Iowa, 172, 161 N. W. 177; Cooke v. Plaisted 181 Mass. 82, 62 N. E. 1054. This is a necessary result." (Emphasis ours.)

And in *In re Levitan* (D. C. New Jersey, 1915), 224 Fed. 241, 243, the court said:

"The liability underlying this judgment, as shown by the foregoing recital of facts, and which record controls this motion, is a provable debt in bankruptcy. Sections 17 and 63a (1), Bankr. Act; Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147; Tindle v. Birkett, 205 U. S. 183, 27 Sup. Ct. 493, 51 L. Ed. 762; Friend v. Talcott, 228 U. S. 33 Sup. Ct. 505, 57 L. Ed. 718; F. L. Grant Shoe Co. v. Laird, 212 U. S. 445, 29 Sup. Ct. 332, 53 L. Ed. 591. *It being a provable debt in bankruptcy, the burden of proof is upon the judgment creditor to show that such liability is within the exception of section 17a (2). In re* Grout (Vt.), 92 Atl. 646, 33 Am. Bankr. Rep. 789. *This burden has not been*

sustained. The record negatives any such wrongdoing as is necessary to constitute maliciousness within the meaning of such section."

And in the case of *Kreitlein v. Ferger*, this Court says:

"There are only a few cases dealing with the subject but they almost uniformly hold that where the bankrupt is sued on a debt existing at the time of filing the petition, the introduction of the order makes out a *prima facie* defense, *the burden being then cast upon the plaintiff to show that, because of the nature of the claim, failure to* give notice or other statutory reason, the debt sued on was by law excepted from the operation of the discharge. Roden Co. v. Leslie, 169 Alabama, 579; Tompkins v. Williams, 206 N. Y. 744, affirming the opinion in 137 App. Div. 521; Van Norman v. Young, 228 Illinois, 425; Beck v. Crum, 127 Georgia, 94; Laffoon v. Kerner, 138 N. Car. 281. Compare Hancock v. Farnum, 176 U. S. 645. There were some decisions to the contrary under the Act of 1841." (Emphasis ours.)

We earnestly urge that this Honorable Court grant the writ of certiorari for the reasons hereinbefore set forth, and submit that if the writ is granted the ultimate decree should reverse the decision of the Circuit Court of Appeals for the Ninth Circuit and the decision of the District Court of the United States for the Southern District of California, Central Division.

Respectfully submitted,

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